

Mr Kenneth N Marsh

## Senate Inquiry into Defence Honours and Awards

30 August 2024

Thank you for the opportunity to make a submission to share my experience of dealing with the Defence honours and awards system and the Defence Honours and Awards Tribunal.

I am a 20 year RAAF veteran. Five of those years were served at Air Base Butterworth (ABB) in Northwest Malaysia during the 1968-89 Communist Insurgency War (CIW). Over the last 12 plus years I have spent considerable time researching the nature of ABB service. In 2023 I made personnel submissions to the Defence Honours and Awards Tribunal's (the Tribunal) "Inquiry into Medallion Recognition for Service with Rifle Company Butterworth" and also contributed to the Rifle Company Butterworth's (RCB) group submissions. I also appeared at the Tribunal's two-day hearings in Brisbane as a representative of the RCB Review Group (RCBRG) in our effort to have ABB service recognised as warlike. I also contributed to submissions made by the Rifle Company Butterworth Review Group and attended the 2023 DHAAT hearings in Brisbane as a delegate of the Group. In 2014 I testified to House of Representatives Petitions Committee Standing Committee on Petitions regarding "reclassification of service by the Rifle Company Butterworth 1979-89 on 19 November 2014. I also supported Mr Raymond Fulcher in his appeal to the Tribunal on 26 March 2020.

Memories of ABB are vague. However, shortly after arriving in September 1971 I was warned of the dangers of booby-traps and told the Malaysians "were dropping bombs on Chin Peng [the Communist Leader] out there in the jungle somewhere." I also know mates who had arrived in the months before me had stood guard on the tarmac with loaded rifles and orders authorising live fire if unrecognised persons failed to stop when challenged.

An obvious change when I returned in July 1997 was revetments to protect the Mirage fighters from indirect attack by Communist Terrorists (CTs)<sup>1</sup>. I also recall roadblocks in the town of Butterworth conducted by Paramilitary Police armed with automatic weapons and barbed wire

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<sup>1</sup> Attached to: AUSTEO *The RAAF Presence at Butterworth*, Para 21, attached to Hamilton R.N, A/First Assistant Secretary Strategic and International Policy Division, *Review of Butterworth Deployment*, 22 October 1976, Reference: DEF 270/1/4. NAA 696/4/4/5 Pt 3

spread across the road. Local papers carried regular articles on activities associated with the war.

My primary role was aircraft maintenance and therefore I was not directly involved with security, although that would have changed if the authorities had considered it necessary or if an attack happened.

The Tribunal cannot do its job properly without receiving factual, accurate and reliable advice and data from the Department of Defence. In the matter of service at ABB, the following historical evidence demonstrates Defence has fallen far short of any acceptable standard. This includes misleading Parliament. This is seen in a quote from a paper prepared for the Parliamentary Petitions Committee in 2014. Quoting Ong Weichong's and Kumar Ramakrishna's article "The "forgotten" insurgency that failed" published in "The Malaysian Insider" in 2013, Defence claimed "the Second Emergency [also known as the CIW] has been described as:

*... a low-intensity campaign of subversion and counter subversion in Singapore and sporadic jungle skirmishes in Malaysia. (emphasis Defence's.<sup>2</sup>*

Referring to what they call the "second phase" of the 1948-60 Emergency, the authors state:

This second phase, sometimes called the Second Emergency, dragged on till the final formal cessation of hostilities in 1989. The CPM's revived armed struggle actually posed a serious security threat that required the combined efforts and resources of the Malaysian, Thai and Singapore governments to resolve.

The clause, "*... a low-intensity campaign of subversion and counter subversion in Singapore and sporadic jungle skirmishes in Malaysia*" is taken out of context from the second paragraph below:

Between 1968 and 1973, CPM groups infiltrated back into Peninsular Malaysia and quietly re-established an underground support network; 1974 then saw an upsurge in CPM terrorism, including assassinations, sabotage and bombings against government installations and personnel on both sides of the Causeway. Such action included the high-profile assassination of Abdul Rahman Hashim, Inspector- General of the Malaysian Police.

The Second Emergency gradually developed into a low-intensity campaign of subversion and counter- subversion in Singapore and sporadic jungle skirmishes in Malaysia. By 1988, the jungle

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<sup>2</sup> Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth. Nature of Service Branch. 28 April 2014. Para 19.

war had gone against the CPM and its underground network had collapsed. Chin Peng agreed to a peace treaty to formally end the Second Emergency a year later.<sup>3</sup>

Richard Stubbs, in the Summer of 1977 edition of Pacific Affairs, tells of

a number of spectacular terrorist attacks – the bombing of the capital’s War Memorial; the assassination of Perak’s Chief of Police; and the grenade and rocket attacks on the Police Field Force Headquarters, Kuala Lumpur Military air base and several camps in Johore, Port Dickson and Penang ...<sup>4</sup>

These were clearly not “sporadic jungle skirmishes in Malaysia”, occurring in the national capital and other urban areas, including Penang state where ABB is located.

Giving evidence to a hearing of the House of Representatives Standing Committee on Petitions, Colonel Murray Thompson, Acting Director General Military Strategic Commitments, stated:

There was a communist insurgency, but it was extremely low level. It was actually along the border area of what is now Thailand and certainly by the mid-seventies it would be characterised as banditry more than a comprehensive insurgency. There were very limited attacks on any Malaysian constabulary, because it was a police action. The military were not deployed against them – only very occasionally.<sup>5</sup>

This evidence is clearly refuted by both Ong Weichong and Kumar Ramakrishna, Richard Stubbs and other evidence discussed by the Tribunal and referred to in this submission. I can provide copies of both articles if requested.

Both Ong Weichong's book “Malaysia’s Defeat of Armed Communism – The second emergency, 1968-1989”, and the Malaysian Army’s book, “The Malaysian Army’s Battle Against Communist Insurgency in Peninsular Malaysia 1968-1989”, show the war was most intense from 1974 into the 1980s with total of 1009 security force casualties, including 155 killed, and 646 between 1974 and 1981.

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<sup>3</sup> Ong Weichong and Kumar Ramakrishna “The “forgotten” insurgency that failed” The Malaysian Insider. 15 October 2013

<sup>4</sup> Peninsular Malaysia: The “New Emergency”. Richard Stubbs. Pacific Affairs. Vol. 50, No. 2 (Summer 1977), pp. 249-262.

<sup>5</sup> House of Representatives Standing Committee on Petitions. Petition on reclassification of service by the Rifle Company Butterworth 1970-89. Wednesday, 29 October 2014. Transcript.

I also discuss the findings of the 2023 Tribunal's report on RCB service. The evidence provided demonstrates a rejection of the incurred danger test that underpins the Australian Repatriation System, a reliance on subjective opinions which is contrary to the objectivity of long standing Government policy, the application of current risk management methodology which could not have been envisaged when the current nature of service (NOS) framework was adopted in 1993, efforts to rationalise away the objective contemporaneous intelligence data before it, and the illogical conclusions made by so doing.

Star officers, current and retired, attended the hearing, with two retired star officers assisting the Tribunal Chair. Those officers were obviously willing to sign off on the final report that included this statement:

There were no casualties of any sort in any of the five rocket attacks in March and April 1975; clearly, it did not follow that casualties were a necessary outcome of indirect fire attacks.<sup>6</sup>

I am suspicious of the behaviour of those Defence representatives with responsibilities for NOS determinations who, based on the evidence below, were, or should have been, aware of certain relevant facts but withheld those from the Tribunal.

I believe the evidence below shows:

- Because of political sensitivities at the time the purpose of the RCB's deployment was concealed in secret documents, with training and other spurious claims used as a cover. (Paras 1-7)
- Australian Defence Force members at ABB were actively involved in its defence, including the defence of Malaysian facilities, property and personnel, "and were therefore exposed to potential risk by reason of the fact there is a continuing danger from hostile forces or dissident elements".<sup>7</sup> (Paras 10, 72, 76)
- Justice Mohr found that Service Chiefs in the years leading up to 1975 had failed to allot personnel for the equivalent of warlike service as they had been directed to, a fact relevant to ABB service during the CIW. During the 1950s and 60s ADF members were accompanied by their families in those warlike service areas. (Paras 12-15)
- The situation facing the Officer Commanding RAAF Butterworth was challenging, faced with the definite threat of small scale attacks at any time without warning, something the Tribunal tried to dismiss. (Paras 16, 17, 86-94)
- The Tribunal was unable to make a comparison with service in other areas as required by CIDA Principle 3 and the refusal of Defence to cooperate. This fact alone questions

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<sup>6</sup> Tribunal, 18.107.b

<sup>7</sup> Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989. Nature of Service Branch 28 April 2014. Para. 111

the Tribunal's conclusions. (Paras 23-30) Also of note is Defence advice to the Minister in 2014 stressing the financial implications of a NOS determinations contrary to CIDA Principle 10 (Paras, 25, 26)

- The Tribunal's assessment of RCB service in 2023 rejected Government policy which led it to subjective and speculative considerations. It must therefore be considered fundamentally flawed(Paras 46 to the end).

To summarise, ADF members at ABB throughout the duration of the CIW were exposed to the definite risk of small scale attacks occurring at any time without warning. Australians were actively engaged in the defence of Malaysian property, assets and personnel. The shared defence plan placed Malaysian and Australian forces under one commander. Both were facing the same enemy under the same conditions and exposed to the same danger. (See para 9). The absurdity of Defence's claim of peacetime service and the Tribunal's conclusion of non-warlike service could not be clearer.

## **RECOMMENDATIONS**

- The Department of Defence be compelled to comply with all requests for information from the DHAAT Tribunal or other reviewing body.
- All Defence Department officials responding to requests for information and advice by Veterans or other bodies be held accountable for the accuracy of the information for that which they provide.
- In the interest of fairness and natural justice, a body independent of both the Tribunal and Defence be established to enable veterans to have an impartial review of Tribunal findings. The Defence Ombudsman has been tried by ABB Veterans and has declined our approach. This to be funded by the Government.
- A written, public apology from the Department of Defence for its demeaning and dismissive attempts to use families to support its claim of peacetime service, and a public acknowledgement of the threats to which they were exposed.

I am able to provide copies of most documents referred to. I also apologise for some small formatting errors that I have been unable to resolve.

Yours sincerely,

## SUPPORTING EVIDENCE

### BACKGROUND

1. During the 1968-89 Communist Insurgency War (CIW) the Malaysian ABB was shared jointly by Malaysian and Australian Air Forces. The British announcement to withdraw its forces from the region in the late 1960s concerned the Malaysian and Singaporean Governments owing to the poorly developed state of their defence forces. Under the newly agreed Five Power Defence Arrangements (FPDA) Australia agreed to maintain two Mirage Fighter squadrons at ABB as the major contributor to an Integrated Air Defence System (IADS) for both nations. This was under the control of an Australian Air Vice Marshall and, I believe, remains so presently.<sup>8</sup>
2. Although Malaysia desired and agreed to the permanent RAAF presence it was sensitive to the permanent presence of foreign forces within its borders. This is reflected in the Exchange of Letters between Australia and Malaysia which spelt out the agreement between both nations on 1 December 1971.

The Government of Malaysia agrees that the Australian force stationed at Butterworth, composed of two squadrons of fighter aircraft and their supporting units and **from time to time an infantry company**, may continue to be stationed there, so long as that is mutually agreed, in accordance with the purposes expressed in the Five-Power Communique of the 16th of April, 1971. With the object of securing mutual agreement, the Government of Australia and the Government of Malaysia will consult together over any proposal to alter the size or character of that force.<sup>9</sup>

3. Three months after the signing of the FPDA, Sir Arthur Tange, Secretary of the Department of Defence, confirmed the presence of a permanent army company at Butterworth as a ready-reaction force. The real purpose of this deployment as a ready-reaction force was hidden from the public under the cover of training:

... In addition, Malaysian reluctance having been overcome, the ANZUK force will now provide one infantry company on rotation through Butterworth on a full-time basis,

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<sup>8</sup> Marsh, "Military and Political Risk in South-East Asia 1971-1989 Australia's Commitment to the Five Power Defence Arrangements and the Integrated Air Defence System", Sabretache vol. LXI, no. 3 – September 2020 .  
<https://recognitionofrcbservice.com/wp-content/uploads/2020/09/Military-and-Political-Risk-in-South-East-Asia-1971-1989.pdf>

<sup>9</sup> Signed on behalf of both Governments by Y.B Tengku Ahmad Rithauddeen Al - Haj bin Tengku Ismail, P.M.K. (Tengku Sri Mara Raja), Deputy Minister of Defence, Malaysia, and H.E. Mr. J.R. Rowland, High Commissioner for Australia. 1 Dec 1971. NAA 568/8/28 Pt5

***ostensibly for training, flag-showing and a change of scene.*** The presence of this company ***will provide the Commander with a ready-reaction force which he can use inter alia to supplement elements available to him under the joint Malaysian-RAAF Plan, but short of an actual overt breach of security the Commander cannot use these troops for guard or other security duties.***<sup>10</sup>

4. As seen in Tange's letter Australia was concerned at the performance of the Malaysians and accepted that in staying at Butterworth it agreed to a level of risk higher than they would normally accept.

Given the division of responsibilities agreed with the Malaysians, the fact that the Base is their property and occupied by them, and the sensitivity of the matter - especially the performance of their personnel - it is recognised that security standards at the base will continue to fall short of those we should like to obtain. We must accept, in remaining at Butterworth, a higher degree of risk than we would if the Base were under the exclusive control of the RAAF ...<sup>11</sup>

5. In January 1973 the Defence Committee met to discuss the withdrawal of the Australian Battalion from Singapore. The minutes record at paragraph 22:

No early decision or action in regard to the RAAF at Butterworth seems desirable. However, it has been the practice to rotate one company at a time from the Australian, UK and NZ battalions in the ANZUK Force to Butterworth for security duties. We should inform the UK and NZ governments that, when the Australian battalion is withdrawn this task will be carried out by an Australian Company with the rotation being mounted directly from Australia.

6. And again, at paragraph 28 (e):

When the Australian battalion is withdrawn, the requirement for a company for security duties at Butterworth will be met by providing the unit, on rotation, from Australia. ***This could be presented publicly as being for training purposes.***<sup>12</sup>

7. These two high level documents show that the real purpose of the RCB deployment was to provide needed security in the face of Malaysian shortcomings under the cover of training and flag-flying have never, to my knowledge, been acknowledged in submissions to different inquires since 2000. ***Why?***

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<sup>10</sup> Tange, A.H (for), Secretary, Department of Defence, *Security of Butterworth*, 71/316e, 2 March 1972. NAA 566/2/148 Pt 5

<sup>11</sup>Tange

<sup>12</sup> Defence Committee, Minute of meeting held on 11 January, 1973, *Five Power and ANZUK Arrangements and Withdrawal of Australian Battalion and Battery*, Agendum No. 1/1973, Minute 2/1973, 11 Jan 1973 NAA 7942, F59

8. The Defence Honours and Awards Tribunal's (the Tribunal) 2023 report on its "Inquiry into Medallion Recognition for Service with Rifle Company Butterworth"<sup>13</sup> acknowledged the fact that the Royal Malaysian Air Force (RMAF) at ABB was engaged on warlike operations against Communist Insurgents in Malaysia. Also acknowledged is the presence of an Australian Rifle Company, known as Rifle Company Butterworth (RCB) and the shared defence plan that committed Australian and Malaysian forces equally to the internal defence of ABB from "a resurgence of militant communist activity both overt and covert ..."<sup>14</sup>
  
9. By agreement, under the shared defence plan, Australia shared responsibility for the defence of Malaysian assets and personnel and shared facilities such as communication systems, water, power, fuel farms and ordinance stores, vital to Malaysia's effort.<sup>15</sup> Both nations forces came under the one Commander, both were exposed to the same danger. In 1976 Group Captain J.R. MacNeil, Defence Advisor in Kuala Lumpur, at a time the RAAF presence at ABB was being reviewed, was of the opinion Malaysia valued the Australian presence at Butterworth and 'might wish the force to stay, under present conditions, because of the assistance it gives to Malaysia' in different ways. The most significant of these appears to be:

It assists the RMAF in running the largest of the four RMAF bases in West Malaysia ... Because of its location and size Butterworth is very important to Malaysia in its efforts to contain the CPM forces, and withdrawal of the RAAF, or significant reduction in its size, would markedly reduce the effectiveness of the base and/or require large diversions of RMAF effort to Butterworth from other bases. The general level of achievement of the RMAF would drop if there was any large reduction in RAAF strength at Butterworth.<sup>16</sup>
  
10. Sentries at ABB were armed with rifles loaded with live rounds and authorised to shoot at suspected intruders who failed to stop when challenged. The RCB'S Quick Reaction Force (QRF) was held on high alert, being required to respond almost instantly to a defence alert with live weapons - see paras. 72,76.

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<sup>13</sup> Defence Honours and Awards Tribunal. Inquiry into Medallion Recognition for Service with Rifle Company Butterworth. Forwarded to The Hon Matt Keogh MP, Minister for Defence Personnel and Veterans' Affairs. 22 August 2023

<sup>14</sup> Tribunal, 15.27

<sup>15</sup> Operation Order No 1/71. Shared Defence of Air Base Butterworth. 8<sup>th</sup> September 1971.

<sup>16</sup> McNeil, J.R. Group Captain. Defence Adviser, *Review of RAAF Presence at Butterworth*, 10 Sept 1976. NAA 696/6/4/5 Pt 3



11. Defence have maintained since at least 2011 that service at ABB was properly classified as peacetime.<sup>17</sup> In 2023 the Tribunal concluded it should be recognised as non-warlike. The Tribunal's assessment of the matter ignored the longstanding principle that a veteran who incurs an objective danger from an armed enemy, whether or not that threat was realised. That understanding is expressed in the July 1965 Cabinet Directive that "... allotment for "special duty" should only be made at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces or dissident elements ..."<sup>18</sup> The direction required allotment at a time of "potential risk", not actual or realised.
  
12. Relevant to this matter is the finding by Justice Mohr in the Review of Service Entitlement Anomalies in respect of South East Asian Service 1955-1975<sup>19</sup> (Mohr), of the failure of Service Chiefs to allot personnel to South-East Asia during the 1963-1966 Indonesian Confrontation and the failure to recognise qualifying service, the equivalent of warlike, during the 1948-1960 Malayan Emergency when the RAAF was at ABB.<sup>20</sup> It has remained at ABB from at least 1958, therefore service through to the end of 1989 can reasonably be seen as just another Defence failure.
  
13. During the Emergency and the Confrontation ADF members were accompanied to Malaya/Malaysia by their families.<sup>21</sup> The 1975 Joint Intelligence Organisation's threat assessment to ABB again, under the heading "Possible forms of attack by the CTO concluded, the "use of booby-traps and minor acts of sabotage by subversive groups are relatively common and pose a distinct threat, both to the Base and to Australian personnel and their dependants".<sup>22</sup>
  
14. Defence now use the presence of families at ABB throughout the CIW as evidence of peacetime service. Brigadier Holmes, on the last day of the Brisbane hearings, said:

Where you've got, you know, 1200 air force personnel and 600 odd family members and whatever else on and around the base all the time, which is very, very similar to the circumstances of most of the Defence activities and operations where we operate in our own country in exactly the same circumstances.<sup>23</sup>

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<sup>17</sup> Senator the Hon David Feeney, Parliamentary Secretary for Defence, to Mr Robert Cross. 19 May 2012.

<sup>18</sup> Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989. Nature of Service Branch 28 April 2014. Para. 111

<sup>19</sup> Review of Service Entitlement Anomalies in respect of South East Asian Service 1955-1975. 2000.

<sup>20</sup> Mohr, Chapter 2

<sup>21</sup> Mohr, Chapter 3.

<sup>22</sup> The Security of Air Base Butterworth. Joint Intelligence Organisation. 1975. Para. 48

<sup>23</sup> Transcript, Day Two

***Really, Brigadier? With the continual threat of boobytraps and other minor acts of sabotage.***

15. As one who was accompanied on my second posting from 1977 to 1980 I see this as a demeaning, condescending and mean-spirited insult to those families who were seen as potential targets. Those families were aware of the threat, of responses to threats by security personnel around their married quarters, and some, including children, came across booby-traps

16. The situation confronting the Officer Commanding (OC) RAAF Butterworth is perhaps well summed up in a secret minute to the DJS (Director of Joint Staff?) the Deputy Chief of Air Staff:

Whilst this office accepts that Armies will never have sufficient manpower to defend an airfield in detail by occupying the area around it and denying an enemy access to the airfield directly or by fire, we continue to be concerned about the lack of any Malaysian Army units around Butterworth to at least deter the CTO. We also recognise that as Armies and Air Forces have different primary roles, the Air Force commander responsible for the ground defence and security of an Air Base, can never be guaranteed the continuance of Army presence if other priorities influence the local Army commander. Therefore, at Butterworth, if the allocation of even one battalion were arranged, its tenure of occupancy in a defensive posture is unlikely to be unconditionally assured. In any case, determined CTs would have only limited difficulty in infiltrating onto the airfield or to within 3.5 inch rocket of 81/82mm mortar range. At best, an infantry battalion represents a deterrent presence.

CT operations are particularly insidious from a defensive viewpoint. The terrorist has freedom of movement in the civil community, a reasonably wide choice in the selection of targets and the types of weapons or nefarious explosive devices which can be used to attack or sabotage personnel, assets and facilities. The defensive penalty in the face of these kinds of threat is the diversion of large numbers of security force personnel to counter the possibility of CT attacks. To ignore the threat of attack is to risk an extremely high loss in terms of assets with the attendant military ignomy, and in terms of political, psychological gains for the CTO. The extent to which both Malaysian and Australia forces are prepared to engage in protracted defensive operations in a compromise is the question to be determined.<sup>24</sup>

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<sup>24</sup> DCAS. Butterworth Security. 14 October 1975

17. In terms of current qualitative risk management practice, a low probability high consequence event ***rates as high, if not extreme, risk***. The Base Commander is held hostage to the unpredictability of guerilla movements, unable to guess when or where they will strike next. This is reflected in the threat assessments referred to later, concluding there was a definite threat of small scale attacks at any time without warning.

## **AUSTRALIAN OPERATIONAL SERVICE MEDALS**

18. Australian operational service medals relevant to this matter are now explained

### **The Australian Active Service Medals**

19. The Australian Active Service Medal and the Australian Active Service Medal 1945-75 (referred to hereafter as the AASM) recognise active, or Qualifying Service, in the Australian Defence Forces. The medals are awarded for prescribed warlike service operations.<sup>25</sup>

### **Warlike**

20. Warlike operations are those military activities where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties. These operations can encompass but are not limited to:

- A state of declared war;
- Conventional combat operations against an armed adversary; and
- Peace Enforcement operations which are military operations in support of diplomatic efforts to restore peace between belligerents who may not be consenting to intervention and may be engaged in combat activities. Normally but not necessarily always they will be conducted under Chapter VII of the UN Charter, where the application of all necessary force is authorised to restore peace and security or other like tasks.<sup>26</sup>

**Note:** In this submission I have used warlike to include service that has previously been classified as Qualifying Service or the like, as those terms within the current framework mean the same thing.

### **The Australian Service Medals**

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<sup>25</sup> AASM 1945-75 Regulations and AASM Regulations.

<sup>26</sup> Cabinet Minute 17 May 1993. No. 1691. Submission 1021 – ADF Deployed Overseas – Condition of Service Framework. Attachment B. Types of ADF Overseas Deployments – Definitions.

21. The Australian Service Medal 1945-75 and the Australian Service Medal (referred to hereafter as the ASM) recognise prescribed non-warlike operations.<sup>27</sup>

### **Non-Warlike**

22. Non-warlike operations are defined as those military activities short of warlike where there is a risk associated with the assigned task(s) and where the application of force is limited to self defence. Casualties could occur but are not expected. These operations encompass but are not limited to:

- **Hazardous.** Activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty such as mine avoidance and clearance, weapons inspections and destruction, Defence Aid to a civil power, Service protected or assisted evacuations and other operations requiring the application of minimum force to effect the protection of personnel or property, or other like activities”.
- **Peacekeeping.** Peacekeeping is an operation involving military personnel, without powers of enforcement, to help restore and maintain peace in an area of conflict with the consent of all parties. These operations can encompass but are not limited to:
  - activities short of Peace Enforcement where the authorisation of the application of force is normally limited to minimum force necessary for self defence;
  - activities such as the enforcement of sanctions in a relatively benign environment which expose individuals or units to ‘hazards’ as described in sub-paragraph 2 (a) [hazardous];
  - military observer activities with the tasks of monitoring ceasefires, re-directing and alleviating ceasefire tensions, providing ‘good offices’ for negotiation and the impartial verification of assistance or ceasefire agreements, and other like activities; or
  - Activities that would normally involve the provision of humanitarian relief.<sup>28</sup>

### **COMMITTEE OF INQUIRY INTO DEFENCE AWARDS (CIDA)**

23. In 1993 the Government established the CIDA Committee to inquire into matters relating to NOS and make recommendations. It established 10 principles to maintain values of “fairness, equity and compassion, and an egalitarian commitment to acknowledge the quality of service and substance of action without regard to status or class”. Among its recommendations was the establishment of an Australian Service Medal 1945-75 to recognise service in a prescribed peacekeeping or non-warlike operation for the period

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<sup>27</sup> ASM 1945-75 Regulations and ASM Regulations

<sup>28</sup> Cabinet Minute 17 May 1993. No. 1691. Submission 1021 – ADF Deployed Overseas – Condition of Service Framework. Attachment B. Types of ADF Overseas Deployments – Definitions.

1945- 75 where recognition has not extended previously through an award” with terms and conditions “similar to those relating to the existing ASM”.<sup>29</sup> Both medals can only be awarded non-warlike operations declared by the Governor General on the recommendation of Defence Minister.

24. Despite the ASM being awarded for service at ABB during the CIW, Defence claim it was awarded for peacetime service. The Tribunal stated this was “simply incorrect”, noting it had been declared a non-warlike operation by the Governor-General on the recommendation of the Minister. The Tribunal considered Defence’s claim that the Australian Service Medal (ASM) could be awarded for peacetime service, “**was of substantiation**”.<sup>30</sup> It further observed:

... the criteria for the ASM and the ASM 1945-1975 are limited to ‘non-warlike’ service and the statement that these medals have been awarded for ‘peacetime’ service, if correct, could suggest **issues of systemic concern beyond the consideration of RCB service**.<sup>31</sup>

### Relevant CIDA Principles

25. Of particular interest to this matter are the following CIDA principles:

- **Principle 3.** To maintain the inherent fairness and integrity of the Australian system of honours and awards care must be taken that, in recognising service by some, the comparable service of others is not overlooked or degraded.
- **Principle 8.** Recognising that its work requires viewing past service through the eyes of 1994, the Committee believes that an appropriate benchmark in considering hitherto unrecognised service between 1945 and 1975 is the terms and conditions that are currently attached to an award of the Australian Active Service and Australian Service Medals. Service rendered during this period which generally meets those terms and conditions should receive retrospective and comparable recognition.
- **Principle 10.** Matters relating to honours and awards should be considered on their merits in accordance with these principles, and these considerations should not be influenced by the possible impact, real or perceived, on veterans, entitlements.

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<sup>29</sup> Committee of Inquiry into Defence Awards.

<sup>30</sup> Tribunal, 9.1.d

<sup>31</sup> Tribunal, 9.1.l

26. A paper prepared for the Minister by Defence's Nature of Service Branch (NOSB) as part of a review of ABB service in 2011 noted:

The cost of including this service in the DVA budget is assessed as significant. The cost of inclusion of the RAAF Police, ADG and dog handlers ... will have an additional cost and extension to all RAAF personnel ... would have a very significant impact.<sup>32</sup>

***If NOS decisions are made on merit regardless of other matters, why is this included in advice prepared for a decision maker?***

### **THE TRIBUNAL'S CIDA PRINCIPLE 3 FAILURE**

27. The Tribunal recognised the importance of CIDA Principle 3 and commented on the refusal of Defence to respond to claimed anomalies in a matrix provided by Veterans, observing that the:

analysis would show that Australian Active Service Medals had been correctly awarded to other service that was directly comparable to RCB service; or

analysis would show that previous awards of Australian Active Service Medals were incorrect.”<sup>33</sup>

28. Justice Mohr (see below) was directed by Government “to also consider the 10 guiding principles for assessing medals entitlements established by the 1993/4 Committee of Inquiry into Defence Awards.<sup>34</sup>

29. Evidence was provided to the Tribunal that would have enabled it to do a Principle 3 comparison in the RCB's submission 65i. There appears to be no acknowledgment of this in its report.

***Its failure to pursue this comparison must leave its recommendations open to question.***

- 3** This failure was contributed to by Defence's failure to cooperate<sup>35</sup> and the Tribunal's outright rejection of the Mohr report (paras 44-56)

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<sup>32</sup> Background Information Paper Nature of Service Classification – ADF Service at RAAF Butterworth. Nature of Service Branch. 14 October 2011. Para 80.

<sup>33</sup> Tribunal 9.16.

<sup>34</sup> Submission. JH00/0088. Review of Service Entitlement Anomalies in Respect of South-East Asian Service 955-1975. JH00/0088/CAB. 21 March 2000. Ministers Executive Summary.

<sup>35</sup> Tribunal 9.6

## JUSTICE MOHR AND ABB

31. In 1999 the Government established the Mohr Review to consider possible anomalies in service entitlements affecting those members of the Australian Defence Force who served in South-East Asia during the period 1955-1975. Mohr passed his review to the Hon Bruce Scott MP, Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, in February 2000.

32. As reported by the Director General Defence Career Management Branch in April 2001:

Mohr attempted as much as possible to stay within their TOR, which was service in SE Asia between 1955-75. Part of the TOR included review of service in SE Asia in relation to the geo-political context of FESR, which concluded on 31 Oct 71. Consequently, service at Butterworth between 1971 and 1975 was not considered.<sup>36</sup>

33. Mohr is not mentioned in the background paper prepared by Minister Bilson 2007.<sup>37</sup>

However, in 2011, Defence's Nature of Service Branch falsely claimed:

In his 1999 report ... Mohr discussed ADF service at RAAF Base Butterworth up to 1975 ... It is of some interest that Justice Mohr did not make specific reference or recommendations regarding service by the RCB. Possible this omission is an indication that he considered all service beyond 27 May 63 as not appropriate for further consideration.<sup>38</sup>

34. This lie is repeated in Defence's 2022 Submission to the Tribunal.<sup>39</sup> It appears the Tribunal was misled by Defence:

It is also significant that, because the Mohr Review did not analyse RCB service by reference to the Cabinet-approved definitions of 'warlike' and 'non-warlike', it did not explain why it considered RCB service should be recognised by the ASM 1945-1975 as opposed to the AASM 1945-1975.<sup>40</sup>

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<sup>36</sup> Review of Service Entitlement In Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989. 5 April 2001. Attachment H to Vice Chief of the Defence Force, Submission to the Defence Honours and Awards Tribunal, Inquiry into the Recognition of Members of Rifle Company Butterworth for Service in Malaysia between 1970 and 1989. 23 June 2010.

<sup>37</sup> Background to Review of Rifle Company Butterworth Nature of Service. Attached to "Request for Nature of Service Review of Rifle Company Butterworth (RCB) Service 1970 to 1989. Signed by the VCDF 28 August 2007.

<sup>38</sup> Background Information Paper Nature of Service Classification – ADF Service at RAAF Butterworth. Nature of Service Branch. 14 October 2011. Para 34, 36.

<sup>39</sup> Defence Submission 096. July 2022. 3.30.b

<sup>40</sup> Tribunal, 7.31. Insert.

35. The same false claim was made in the 2014 Defence paper prepared for the Parliamentary Petitions Committee at paragraphs 88 to 95.<sup>41</sup>

## **DEFENCE REVIEW OF ABB SERVICE 2000**

36. ADF service at ABB is currently recognised by the award of the ASM. In a 2010 submission to the DHAAT inquiry into RCB service at ABB, the Vice Chief of the Defence Force (VCDF) advised:

On 19 July 2000 the Acting Chief of the Defence Force wrote to the Minister Assisting the Minister for Defence seeking approval to institute a Clasp 'SE ASIA' for land service rather than an extension of the Clasp 'FESR' [as recommended by Mohr], and that service in South-East Asia be recognised beyond 1971 to at least 1975, with consideration of service at Butterworth to 1989. These proposals were agreed on 9 August 2000.<sup>42</sup>

37. On 28 March 2001, the Director General Career Management Branch advised the Chief of Defence Force (CDF):

The extension of recognition is based on the principle established by MAJGEN Mohr, during his deliberations on service in SE Asia that if ADF personnel are placed in circumstances where they may be used to react to an assessed threat made by Australian Government Intelligence agencies, it has to be considered operational service. This is regardless of whether that threat is realised or not;

Also, the recommendations are consistent with CIDA Principle No 3 which states, *inter alia, care must be taken that in recognising service by some, the comparable service of others is not overlooked or degraded.*<sup>43</sup>

38. The Tribunal was fully aware of this fact, reproducing the advice at Chapter 7:46.

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<sup>41</sup> Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth. Nature of Service Branch. 28 April 2014. Para 88to95

<sup>42</sup> Vice Chief of the Defence Force, Submission to the Defence Honours and Awards Tribunal, Inquiry into the Recognition of Members of Rifle Company Butterworth for Service in Malaysia between 1970 and 1989. 23 June 2010. Para 17

<sup>43</sup> Director General Career Management Branch. Inquiry into the Recognition of Members of Rifle Company Butterworth for Service in Malaysia between 1970 and 1989. 23 June 2010. Para 1,2. Appendix G to Vice Chief of the Defence Force, Submission to the Defence Honours and Awards Tribunal, Inquiry into the Recognition of Members of Rifle Company Butterworth for Service in Malaysia between 1970 and 1989. 23 June 2010.



## DEFENCE REJECT GOVERNMENT POLICY

- 3 Following a 2006 request from RCB veteran Mr Robert Cross to have RCB service recognised as warlike defence conducted a further review. There is no recognition in the report produced by this review of the earlier, 2001 decision. Acting on the advice of this review the Minister for Veterans Affairs acting for the Minister for Defence signed instruments recognising RCB service as non-warlike (hazardous and non-warlike).<sup>44</sup>
- 4 Defence noted that Justices Mohr and Clarke had “interpreted the definitions of warlike and non-warlike in a particular way and applied those definitions to operations conducted before those terms and conditions were defined an introduced into legislation and policy”.<sup>45</sup> Being uncomfortable with this approach the CDF, acting on advice from the Chiefs of Service Committee, “directed that anomalies be reviewed against the legislation and policy that was extant at the time of the conduct of the operation”.<sup>46</sup>
41. This was a departure from Government policy as seen in the Ministerial submission to Cabinet regarding the Mohr review. The Minister Assisting the Minister for Defence, the Hon. Bruce Scott MP, advised:
- The review concludes that there are a considerable number of deployments of ADF personnel to SE Asia 1955-75 where the determination of entitlements to medals and repatriation benefits is anomalous. On the basis of the new information provided in the Mohr Report, the Department of Defence has reassessed each deployment against the criteria of ‘warlike’ and ‘non-warlike’ as directed by Cabinet on 22 April 1997 in Cabinet Minute JH/0057/CAB/2. The results are in most cases identical to the recommendations of the Mohr Report. While extending these entitlements, I propose to reject the Mohr Review’s policy analysis which could have significant flow-on effects under the Veterans’ Entitlements Act 1986. I propose instead to affirm the current set of objective criteria for assessment of ‘warlike’ and ‘non-warlike’ service and thereby provide the framework against which any further historic claims and all future service can be assessed.<sup>47</sup>
42. The Minister acknowledged new information provided by Mohr, directed Defence to review Mohr’s recommendations against the 1993 warlike and non-warlike framework, and reported that this review reached identical conclusion in most cases. Importantly, it

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<sup>44</sup> Vice Chief of the Defence Force, Submission to the Defence Honours and Awards Tribunal, Inquiry into the Recognition of Members of Rifle Company Butterworth for Service in Malaysia between 1970 and 1989. 23 June 2010. Attachments K, L.

<sup>45</sup> Background to Review of Rifle Company Butterworth Nature of Service. Para 5.

<sup>46</sup> Background to Review of Rifle Company Butterworth Nature of Service. Para 6.

<sup>47</sup> Cabinet Submission No JH00/0088 dated 17 March 2000, NAA A14370, JH2000/080, p.4. Submission 96b, Department of Defence.

affirmed the current framework as a “**set of objective criteria against which any further historic claims ... can be assessed**”.

43. The Tribunal commented on this move in the insert at Chapter 7.68:

The Tribunal considered that it was not for the CDF to unilaterally discard or overturn the express definitions and process agreed by Cabinet and Ministers. If that was desired, the proper course would have been to seek Ministerial agreement, after Prime Ministerial consultation, to that course of action. In doing so, the Minister should have been expressly advised of the previous decisions and given a reasoned explanation of why an alternative approach should be adopted. The submission to Minister Billson did not do this.

#### **WHERE THE TRIBUNAL WENT WRONG – MOHR**

44. Australia's repatriation system is built on the basis of “incurred danger”. Veterans who have “incurred actual danger ... from the hostile forces of an enemy at a time when that person was engaged in operations against the enemy”. It is not a requirement for that threat to be realised, only that it exists as a potential and objective threat. It will now be shown that the Tribunal lost sight of, and departed from, this longstanding principle. Much of the information below has been cited or copied directly from the Tribunal's report.

45. At 7.33 the Tribunal quotes from the Minister’s submission to Cabinet on his response to the Mohr Review:

While there is no specific recommendation on the matter, in general discussion, the Mohr Review expresses a view on current repatriation entitlement for determining entitlement to full repatriation benefits. ***This policy includes a longstanding requirement that a veteran must have incurred actual danger, as distinct from a perceived danger, from hostile forces of the enemy at a time when that person was engaged in operations against the enemy.*** (emphasis added) The Review adopts a particular approach to the decision on whether actual danger was incurred, and then uses this approach as the basis of the Report’s recommendations to grant full repatriation benefits. The approach adopted by the Review is considered by the Department of Veterans’ Affairs to be at odds with judicial precedent. If accepted, it could significantly extend veteran benefits in other circumstances. While the Defence consideration of ‘warlike’ and ‘non-warlike’ service has come to the same conclusion as the Mohr Review on benefits for particular deployments, it has done so on grounds that are different from those in the Review ...

#### **The Tribunal’s Response**

46. The Tribunal’s response to this statement is found in chapter 7.31 of its report:

The significance of this approach for present purposes is that the above wording has since been relied upon in very many of the submissions made by RCB veterans and their representative organisations when arguing that RCB service should be recognised as 'warlike'. This is most unfortunate because, as discussed below, the generally accepted official view (which was shared by the Tribunal) is that the Mohr Review took an interpretation of the concept of incurred danger that was incorrect and unsupported by decisions of the courts.

That unfortunate result was further compounded by the fact that, after the VEA amendments to insert the definitions of warlike and non-warlike service, the term 'incurred danger' was not an element required for the qualifying service which RCB veterans and organisations sought to have accepted – unless the VEA was amended to deal specifically with RCB service, they could only be accepted as having provided qualifying service if their service was determined by the Minister to be 'warlike service'.

47. At 10.15 the Tribunal reiterated its view that:

Under the VEA, 'incurred danger' is an applicable test for some categories of qualifying service. But as explained in Chapter 5, if RCB veterans are to be granted the veterans' entitlements they seek, they must satisfy the different test of 'warlike service'. ***The 'incurred danger' test is simply not applicable to RCB service*** and therefore, whatever it means, ***is not relevant in the present inquiry.***

48. What the Minister did not accept was Mohr's interpretation of the incurred danger test. He affirmed as policy the "***longstanding requirement that a veteran must have incurred actual danger, as distinct from a perceived danger, from hostile forces of the enemy at a time when that person was engaged in operations against the enemy.***" Yet the Tribunal said, in effect, ***Government policy was "simply not relevant to the present inquiry."***

49. The implication of this statement is readily apparent. ***The review was conducted contrary to Government policy and therefore is fundamentally unsound.***

50. The Tribunal made no effort to determine what was wrong with Mohr's interpretation. As at paragraph 37 above, the 2001 decision to recognise ABB service was:

based on the principle established by MAJGEN Mohr, during his deliberations on service in SE Asia that if ADF personnel are placed in circumstances where they may be used to react to an assessed threat made by Australian Government Intelligence agencies, it has to be considered operational service. This is regardless of whether that threat is realised or not.

51. At paragraph 7.73, the Tribunal quotes Minister Bilson's letter to Mr Cross advising his request for the upgrading of his service to the AASM had not been granted. In this letter he affirmed the incurred danger test:

***... your submission was assessed against the incurred danger test which is the fundamental concept underlying the award of the full package of veterans' entitlements.*** (emphasis added) ... the key issue is a judgement on the extent to which RCB personnel were exposed to the risk of physical and mental harm and whether or not it was sufficient to justify allotment for special duty ... the Vice Chief of the Defence Force has advised that the extent of the danger incurred by the RCB during the period 1970 to 1989 was not sufficient to warrant allotment for special duty.

52. The introduction to the Terms of Reference for the Review of Veteran's Entitlements (the Clarke review) state the Government's commitment "to providing fair, consistent and appropriate benefits to Australia's veterans."<sup>48</sup>

53. Deliberating on the interpretation of the incurred danger test, Clarke quoted Mohr<sup>49</sup>:

To establish whether or not 'objective danger' existed at any given time, it is necessary to examine the facts as they existed at the time the danger was faced. Sometimes this will be a relatively simple question of fact. For example, where an armed enemy will be clearly proved to have been present. However, the matter cannot rest there.

On the assumption that we are dealing with rational people in a disciplined armed service (i.e. both the person perceiving danger and those in authority at the time), then if a Serviceman is told there is an enemy and he will be in danger, then that member will not only perceive danger, but to him or her it will be an objective danger on rational or reasonable grounds. If called upon, the member will face that objective danger. The member's experience of the objective danger at the time will not be removed by 'hindsight' showing that no actual enemy operations eventuated.<sup>50</sup>

54. Clarke then concluded:

Because the term 'danger' connotes risk, or possibility, of harm or injury, there is necessarily an element of subjective belief involved. In a declared war, no one would doubt that to carry out operations against the enemy at a place under risk of attack exposes those in the operations to danger. Yet who at the time would actually know, rather than perceive, that the place is at risk? The enemy might have no intention of attacking there, but assessments have to be made, or beliefs formed, by military authorities as to whether the place is at risk and needs defence by armed forces.

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<sup>48</sup> Review of Service Entitlements. 2003

<sup>49</sup> Mohr. Chapter 2. Incurred danger, perceived danger, and objective danger.

<sup>50</sup> Review of Service Entitlements. 2003. Para 11.57

If then, the military authorities consider that a particular area is vulnerable to attack and dispatch armed forces there, they are sending forces into harm's way, or danger. This was the second point made by Mohr - that veterans ordered to proceed to an area where they are endangered by the enemy will not only perceive danger, but to them the danger will be an objective one based on rational and reasonable grounds. In these circumstances, what the historian says he or she has learned since the war about the actual intention of the enemy is hardly relevant.<sup>51</sup>

55. As seen in Defence Minister Vale's response, copied from the Tribunal at 7.59, the Government rejected Clarke's view that the incurred danger test had been interpreted too narrowly. However, they affirmed that there "be no change in the statutory test for Qualifying Service", which had been replaced by warlike service." (below)

Traditionally, Australia has provided a special level of benefit for veterans with **Qualifying Service – that is, those who have faced the risk of personal harm from an enemy – as opposed to Operational Service** (emphasis added)

Today, the concept of **Qualifying Service has been replaced by Warlike Service**, (emphasis added) defined as operations where the application of force is authorised for specific military objectives and where there is an expectation of casualties.

...

So we endorse and accept the Committee's recommendation that there be **no change in the statutory test for Qualifying Service**. (emphasis added)

However, we reject the Committee's view that the 'incurred danger test' has been interpreted too narrowly by the courts and administrators.

Public support and confidence in the generosity of our Repatriation System depends on the 'incurred danger test' remaining objective. **We would create anomalies if we were to confuse a state of readiness, or presence in a former enemy's territory, with the real and tangible risks of facing an armed and hostile enemy**. (emphasis added)

56. The objective, incurred danger test as the foundational principle of the Repatriation system is repeatedly affirmed. The Minister's comment, "We would create anomalies if we were to confuse a state of readiness, or presence in a former enemy's territory, with the real and tangible risks of facing an armed and hostile enemy," it is logical to conclude it is the second part of Mohr's analysis, that "if a Serviceman is told there is an enemy and he will be in danger ..." that was rejected, not the "real and tangible risks of facing an armed enemy."

## The Tribunal's Subjective Assessments

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<sup>51</sup> Review of Service Entitlements. 2003. Paras 11.59, 11.60.

57. The 1993 NOS framework was approved before the first Australian risk management standard was published in 1995. This became the precursor to the International Organization for Standardization's risk management standards.<sup>52</sup> It was not until early 2002 that Defence introduced a Risk Management Framework based on an updated standard.<sup>53</sup> As current risk management methodology has its origins in the 1995 standard the application of current practice to the 1993 Framework is considered illegitimate as it must alter the intent of the Cabinet decision. Therefore, terms such as "low" and "unlikely" considered by the Tribunal cannot be understood in the light of modern risk management practice.

58. The futility of the Tribunal's efforts to apply current risk management practices to services in the 1970s is seen in the following comments:

18.126. As detailed in Chapter 14, the likelihood of a CT attack on ABB in most official Australian assessments over the period of RCB service was mostly rated as *unlikely*, although the likelihood of attack was assessed to be *possible* in some defined, limited circumstances. Similarly, the threat level was assessed as *low* in a small number of reports, principally limited to those generated by DAFI. No likelihood assessment or threat ratings from an Australian intelligence agency ever exceeded these ratings. The Tribunal was unable to identify any standard or other lexicon applicable and in use at that time, whether in the general community or more specifically within the Defence and intelligence community, that would give a definitive indication of the meaning intended by those who chose to use those terms in preparing those assessments. Accordingly, the Tribunal concluded that these terms were likely intended to bear their usual meaning in ordinary English usage. The Tribunal considered that, by that measure, those terms were consistent with a likelihood assessment that casualties were possible and did not imply an *expectation* of casualties.

18.127. The Tribunal additionally considered how those terms might be considered today, when there is far more consensus about generally accepted standards for risk management. In this regard, the Tribunal noted that delineation between the *possibility of casualties* and the *expectation of casualties* is made clear in modern risk management lexicons, where the term 'expectation' is most typically linked to events that are *certain to occur*. In contrast, the term 'possibility' is linked to a *possible* or lower likelihood descriptor commonly used in five-level risk assessment frameworks, as shown in the following table. [in report]

59. Qualitative risk management matrixes, those that assess risk in terms of probability and consequence, are inherently subjective. Any attempt to apply this to the 1970s where guesses must be made about the meaning of terms used in threat assessments from that

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<sup>52</sup> History of developing risk management standardization. At <https://rmtap.com/history-rm-standardization.htm>. Accessed 24 Apr 2023.

<sup>53</sup> Australian Defence Risk Management Framework: A Comparative Study. Svetoslav Gaidon and Seng Boey. Australian Government. Department of Defence. Defence Science and Technology Organisation. Executive Summary, and page 2.

period can provide no certainty about the risk level calculated by these. The inherent uncertainty fails to provide any confidence in the Tribunal's findings and can only erode confidence in it in the eyes of the community it is meant to serve.

60. Compare the Tribunal's "the threat level was assessed as *low* in a small number of reports, principally limited to those generated by DAFI" with the situation at Ubon, Thailand, post 1965 where Mohr's recommendation that service be upgraded from non-warlike to warlike was accepted by Defence:

Nevertheless, the Defence Committee considered

**"the probability of enemy air attacks [on Thailand] would be slight".<sup>54</sup>**

## **WHERE THE TRIBUNAL WENT WRONG – RULES OF ENGAGEMENT**

61. The Tribunal, at chapter 15.3-5, discusses the specific context in which the RCB operated. It noted "significant limitation imposed on RCB operations", including the fact "the RCB was not to aid civil power in the maintenance of law and order in civil disturbances", and that its "operations were ... limited to within the lateral confines of Air Base Butterworth" unless otherwise authorised. At 15.6 it quoted appendix C to the Shared Defence Plan, "You are to take careful note of the fact that your right to shoot ceases at the Air Base boundary fence. You are not to shoot at a person on the other side of the fence."
62. These restrictions are readily explained. They applied to the internal defence and security of an operational air base used by Australian and Malaysian forces working in close proximity, and, at times, next to each other. Malaysian civilians were employed on the base, Malaysian civilians lived in Kampongs beside the fence, the highway between Butterworth and the Thai border ran through the base, and RAAF families lived on the base.
63. Sensitivities regarding the RCB operations are discussed in the article "Military and Political Risk in South-East Asia 1971-1989 Australia's Commitment to the Five Power Defence Arrangements and the Integrated Air Defence System", published in *Sabretache*, 2020.<sup>55</sup>
64. Compare this to the ROE applying to operations on the Thai/Malay border in the period of August 1960 to May 1963. Acting on Mohr's recommendation Defence upgraded this time from non-warlike to warlike. To quote Mohr:

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<sup>54</sup> Mohr, Chapter 6. And Cabinet Submission No JH0/0088 dated 17 March 2000, NAA A14370, JH2000/080, p.4. Submission 96b, Department of Defence. Attachment F. Recommendations of the Mohr Report.

<sup>55</sup> Marsh, "Military and Political Risk in South-East Asia 1971-1989 Australia's Commitment to the Five Power Defence Arrangements and the Integrated Air Defence System", *Sabretache* vol. LXI, no. 3 – September 2020 . <https://recognitionofrcbservice.com/wp-content/uploads/2020/09/Military-and-Political-Risk-in-South-East-Asia-1971-1989.pdf>

Patrols were briefed to “Remember that you will be on your own and that we do have a hostile enemy”. While the *patrols were not to shoot on sight due to the possibility of civilians being in the patrol areas*, they were to conduct cordon, search, ambush and food denial tasks.<sup>56</sup>

65. Mohr, in his deliberations on Ubon, quoted from a review of Thailand operations by the Defence Committee in 1965:

“while the operations by RAAF aircraft in the air defence role will be confined to the boundaries of Thailand, the fact that RAAF aircraft are being employed in the defence of an air base from which offensive operations are being mounted against North Vietnam could be considered by North Vietnam and Communist China as being similar to participation in the actual offensive operation”<sup>57</sup>

66. It was on the basis of this, and other facts, including changes to ROE, that Mohr recommended the upgrade to warlike service, subsequently endorsed by Defence. CIDA 3 requires like service be equally recognised.

#### **Different ROE at ABB – On and Off Base**

67. The Tribunal’s comments at 15.9 show it had not properly considered the situation at ABB where two distinct versions of ROE applied:

It was not clear to the Tribunal, particularly in the case of the crash site picquet, and given the absence of ROE that specifically permitted the use of force beyond the airfield boundary, how the RCB could have legally employed force in such circumstances should it have been required.<sup>58</sup>

68. ROE are addressed in different places, including Field Force Staff Instruction 2 of 79. The “area within ... the Air Base ... has been declared a **‘Protected Place’** ... This gives the right to control access ... and the apprehension of any suspicious person, if necessary by the use of force including firearms.”
69. Areas outside the Base had “been declared a **‘Protected Area’** ... This does not give the right to control access within the area but does give a right to control movement and conduct within the area, including a right of entry or search of persons in the area and similar rights for the apprehension and removal of suspicious persons, if necessary by use of force.” There was a significant difference between “a ‘Protected Place’ and a ‘Protected Area’ ... within a ‘Protected Place’ the right to shoot was automatic whereas within a

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<sup>56</sup> Mohr, Chapter 5

<sup>57</sup> Mohr, Chapter 6.

<sup>58</sup> Tribunal 15.9



'Protected Place' ... the order to open fire required authorisation by the Base Commander".<sup>59</sup>

70. Field Force instruction 2/79 addressed training and the carriage of ammunition away from ABB. Permission was required from the Office Commanding RAAF Butterworth for the carriage of live rounds off the Base:

Because of the possibility of encounters with wild animals or belligerents, a company commander may wish to issue a limited amount of ball ammunition to provide a degree of safety during field training exercises for which blank ammunition is also to be issued. Carriage of ball ammunition for this purpose is authorised, subject to approval by OC RAAF Butterworth and the conditions listed at Annex D.<sup>60</sup>

71. Great care was required to prevent accidental usage. If authorised, ball ammunition was:

to be 'sealed' by a piece of heavy duty adhesive tape affixed over the top of the magazine in such a manner as to prevent a round being fed into the chamber without prior removal of the tape, and marked with by a strip of white masking tape placed around the magazine near the base ... Each magazine containing ball ammunition is to be carried in a basic pouch sealed by tape in such a manner that inadvertent opening of the pouch is unlikely.<sup>61</sup>

### **Protected Place**

72. On the other hand, under the shared defence plan, sentries at ABB were normally armed with rifles – sub-machine guns were considered preferable in some situations.<sup>62</sup> Orders specifically applying to rifles stated:

The bayonet is to be fixed and the magazine charged with 20 rounds. No round may be fed into the breech until you are preparing to fire. Your safety catch is to be applied.<sup>63</sup>

73. The conditions applying outside the "Protected Place" stand in clear contrast to those within the perimeter of ABB. At all times the RCB Quick Reaction Force (QRF) was issued with loaded magazines and link ammunition while on duty. This was to be stored in the QRF

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<sup>59</sup> Field Force Command. Staff Instructions 2/79. General Instructions for the Australian Rifle Company at Air Base Butterworth. Annex A. Rules of Engagement. Paras 3-5. 6 July 79

<sup>60</sup> FF 2/79. Para 22

<sup>61</sup> Annex D to HQ FF COMD STAFF INSTR 2/29. DATED 6 JULY 79. Para 1.b, c.

<sup>62</sup> APPENDIX 5 TO ANNEX C TO AIR BASE BUTTERWORTH ORDER NO 1/71. DATED 8<sup>TH</sup> SEPTEMBER 1071. Para 3.

<sup>63</sup> *Ibid* 13.a

duty room, along with weapons.<sup>64</sup> Members of the QRF could not leave this room while on duty unless ordered to do so or with permission of their commander.<sup>65</sup> When moving around on the base, either on patrol or for training, live ammunition was required to be carried in the QRF vehicle, thus making it available at all times for use if reacted.<sup>66</sup> To that, add the requirement that sentries carried live ammunition in magazines attached to their rifles.

74. Those ROE, as mentioned in other places, authorised sentries to shoot at unidentified persons that failed to halt when challenged.

### **ROE and Alert States**

75. ROE and alert states go hand in glove. In peacetime training ADF personnel participate in live weapons training under strict controls. The definition of military objectives (see below) clearly forecast armed enemy threats and the aim to gain military advantages.

76. Alert states for the RCB QRF and pilots at Ubon were almost identical, the difference being the response time at ABB would be quicker than at Ubon.

- At Ubon, Alert Five required “that two fully armed aircraft be at the end of the runway with pilots in close presence, ready and able to be airborne within five minutes to engage an intruding enemy with a view to its destruction, subject to identification or lack of it. The danger of casualties was clearly forecast.”<sup>67</sup>
- At all times the ABB RCB Quick Reaction Force (QRF) was issued with loaded magazines and link ammunition while on duty. This was to be stored in the QRF duty room, along with weapons.<sup>68</sup> Members of the QRF could not leave this room while on duty unless ordered to do so or with permission of their commander.<sup>69</sup> When moving around on the base, either on patrol or for training, live ammunition was required to be carried in the QRF vehicle, thus allowing the QRF to respond quickly to any real or perceived defence threat.<sup>70</sup>

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<sup>64</sup> Unit Standing Orders. Australian Rifle Company. Air Base Butterworth. Malaysia. Revised, 12 Dec 78. Appendix C. Para 10

<sup>65</sup> *Ibid*, Para 4

<sup>66</sup> *Ibid*, Para 10

<sup>67</sup> Mohr Chapter 6

<sup>68</sup> Unit Standing Orders. Australian Rifle Company. Air Base Butterworth. Malaysia. Revised, 12 Dec 78. Appendix C. Para 10

<sup>69</sup> *Ibid*, Para 4

<sup>70</sup> *Ibid*, Para 10

77. The CIDA Principle 3 equivalency is again seen here.

### **WHERE THE TRIBUNAL WENT WRONG – EXPECTATION OF CASUALTIES**

78. The Tribunal spent considerable time in its efforts to determine if there was an expectation of casualties at ABB. At 18.13.d it states it “did not find any contemporaneous record expressing an expectation of casualties.” And, at 18.95, “Defence argued that there was no record of an expectation of casualties from Rifle Company Butterworth rotations.”

79. There is simple explanation; ***it was not a requirement until the introduction of the 1993 framework***, four years after the cessation of the 21-year CIW. Also relevant is the advice of the VCDF in 2010.

80. In 2010 the Vice Chief of the Defence Force advised the DHAAT:

The nature of service determination indicates the type of operation being planned and expresses the extent to which ADF personnel will be exposed to danger, hazards, threat and risk as a consequence of their deployment on an authorised overseas military operation. Determining the nature of service is a robust process which takes account of operational tasks and military objectives; and the rules of engagement which authorise the application of, and limitations on, the use of lethal force to achieve the assigned mission. VCDF 2010 34

81. Members of Defence with responsibility for NOS determinations were both present at the hearings and provided written responses to requests from the Tribunal. One would expect them to be in a position to provide accurate and professional advice to the Tribunal. Given the VCDF’s comments in 2010 regarding the expectation of casualties, in NOS determinations ***why was that information withheld from the Tribunal?*** While things may have changed since 2010, the RCB case cannot be assessed by methodologies that have only come into practice after the event.

### **ROE, Military Objectives and the Expectation of Casualties**

82. The Tribunal was dissatisfied with the agreement on military objectives arrived at during the Brisbane hearings. At 13.7 it states:

In the present matter Defence suggested that this term ‘military objectives’ in the phrase pursue military objectives that is used in the ‘wartlike’ definition should be interpreted in line with the Australian Defence Force Glossary which defines military objectives as legitimate objects of attack which comprise:

- all combatants who have a capacity and are willing to fight;
- establishments, buildings and locations at which the armed forces or their materials are located;
- other objects which, by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances at the time, offers a definite military advantage<sup>71</sup>.

83. It opined this official Defence definition, focusing on physical hazards at the exclusion of higher-level objectives, “appeared ... to be a rather stilted and inappropriate usage that would reflect an overly narrow interpretation of the term, particularly when compared to longstanding doctrinal view of that term.”<sup>71</sup> Accordingly, it “considered that the risk and hazard to which the definitions refer is that from a hostile opposing force capable of inflicting casualties.”<sup>72</sup> Therefore it concluded that the difference between the categories [warlike and non-warlike] must hinge upon the likelihood of casualties”.<sup>73</sup>

84. Again, the Tribunal is playing with definitions. Non-warlike service encompasses activities such as hazardous; mine clearing, weapons inspections, protected or assisted evacuations requiring the application of minimum force to protect persons or property, etc. Peacekeeping operations are conducted with the consent of all parties, and humanitarian relief.

85. None of these are applicable to ABB, where Australian and Malaysian forces cooperated to defend the base against an armed enemy, the Malayan Communist Forces.

### **Assessing the Expectation of Casualties**

86. Discussing the expectation of casualties Defence recognised the expectation must be based on objective criteria unqualified by subjective terms such as “high”, “low” or anything else:

13.20. It is also fundamental in interpreting the definitions to have regard to the words used and to not introduce unwarranted glosses. In particular:

- a) the expectation of casualties that triggers the ‘warlike’ definition is any expectation and does not have to be a ‘high’, ‘medium’ or even ‘low’ or other level of expectation;

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<sup>71</sup> *Ibid* 13.8, 13.10

<sup>72</sup> *Ibid.* 13.16

<sup>73</sup> *Ibid* 13.19

- b) the possibility of casualties that triggers the ‘non-warlike’ definition is any possibility and similarly does not have to be a ‘high’, ‘medium’ or even ‘low’ or other level of possibility; and
- c) the level of force that is authorised to be applied is not limited to ‘lethal’ force.

13.21. The fact that the definitions speak in terms of possibility and expectation also has another important implication. It means that the fact that a possibility or expectation did not eventuate is irrelevant. Hindsight may show that a belief that something was impossible was wrong, or that an expectation was unreasonably entertained. But it can never deny that a possibility existed or that an expectation was in fact held.

87. However, it was unprepared to leave it at that, going on to attempt to qualify the expectation in subjective terms. The absurdity of this approach is seen in the following assessment:

18.107. The Tribunal considered that key aspects of the RCB Review Group argument were built on selective extracts from various documents that either misrepresented the conclusion of the document, or ran counter to the general thrust of the document. The RCB Review Group appeared to have reconstructed its own conclusions based on selective extracts from authoritative documents and occasionally flawed logic that allowed it to arrive at a vastly different conclusion than the parent document. For example, the *Submission on the Expectation of Casualties* states that *Having said that mortar and rocket attacks were essentially expected and that the use of the booby-traps that had inflicted heavy losses on the Malaysians was a distinct threat, it must follow that Australian casualties were expected*. The Tribunal did not agree with this conclusion for the following reasons:

- a) The quote that an attack...using mortars or other indirect fire weapons...is quite likely was a comparative assessment made by JIO against other potential methods of attack; notwithstanding this intermediate observation, the JIO report went on to conclude that the likelihood of Butterworth being attacked, regardless of the method of attack, was unlikely.
- b) There were no casualties of any sort in any of the five rocket attacks in March and April 1975; clearly, it did not follow that casualties were a necessary outcome of indirect fire attacks.
- c) The intelligence source for the quote that The CTO has given instructions to its underground organisation in Peninsular Malaysia to carry out rocket attacks *against air bases* was unclear. These ‘instructions’, which were interpreted as meaning that Butterworth and/or Alor Star were ‘possible targets’, appeared to run counter to JIO assessments of the day and, as far as the Tribunal could determine, no attacks on Alor Star (or Butterworth) were ever reported.<sup>74</sup>

88. The phrase “quite likely was a comparison assessment” is a subjective value judgment based on silence. It ignores the “definite risk of small scale, isolated attacks designed to

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<sup>74</sup> Tribunal 18.107

damage vital points and injure personnel on ABB at any time without warning” identified by ANZUK in 1971.<sup>75</sup> The conclusion “it did not follow that casualties were a necessary outcome indirect fire attacks” is absurd. ***Why would an enemy resort to these if it were not to inflict damage to equipment and personnel?***

89. Contemporaneous evidence from 1975 expresses the seriousness with which senior military personnel took these attacks. The CAS informed the minister in October 1975:

The recent intelligence information concerning possible CTO [Communist Terrorist Organisation] intentions to launch rocket attacks on bases in Malaysia increases our concern regarding the security of areas around the base. Intelligence sources consider there is a possibility that CTs [Communist Terrorists] have or are able to obtain 81/82mm mortars to supplement their known supplies of 3.5 inch rockets. Mortars are crew served weapons which are accurate area weapons of considerable destructive force against targets at maximum ranges of 4,700 metres. The attached map shows that at a range of 3000 metres from the Butterworth Base, a perimeter of 16,000 metres is formed. To compound the problem of defence, the area within the perimeter includes a large number of Malaysian houses, a network of roads and several hectares of padi-fields, all of which offer CTO assembly and firing bases.<sup>76</sup>

#### **Expectation of Attack Must Mean Expectation of Casualties.**

90. The expectation of attack cannot be divorced from the expectation of casualties.
91. In 1971 ANZUK assessed “there is a potential threat to the Base from the Communist Party of Malaya” and affiliated “subversive organisations”.<sup>77</sup> The same document assesses “there is definitely a risk that one or more CTs or members of subversive groups known to be acting in the vicinity, could, regardless of CPM/CTO policy and/or acting on their own initiative, attempt an isolated attack on or within the base at any time.”<sup>78</sup>
92. The 1975 Joint Intelligence Organisation’s threat assessment to ABB again, under the heading “Possible forms of attack by the CTO concluded, the “use of booby-traps and minor acts of sabotage by subversive groups are relatively common and pose a distinct threat, both to the Base and to Australian personnel and their dependants” .<sup>79</sup>

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<sup>75</sup> ANZUK Intelligence Group (Singapore). Note No. 1/1971. The Threat to Air Base Butterworth up to the End of 1972. Singapore. 30 November, 1971.

<sup>76</sup> Rowland, J.A, Air Marshall, CAS *Security of Butterworth* 554/19/33 (87), 7 Oct 75 NAA 564/8/28 Pt 8.

<sup>77</sup> The Threat to Air Base Butterworth up to the end of 1972. ANZUK Intelligence Group (Singapore). Para 71.

<sup>78</sup> ANZUK, Para 71

<sup>79</sup> The Security of Air Base Butterworth. Joint Intelligence Organisation. 1975. Para. 48

93. Any attempt to differentiate between a “potential threat” and a “potential risk” in these circumstances is, I suggest, pedantic. A “distinct threat” that could realise “at any time without warning” can only mean there was, at the time, an expectation of casualties.
94. The Tribunal sought to dismiss this threat, but the “at any time without warning” meant the Base Commander must be prepared to respond, “at any time without warning.”

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